Supreme Court, U.S.
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No. 04-673

In The

Supreme Court of the United States

MOODY NATIONAL BANK OF GALVESTON,

Petitioner,

v.

GE LIFE AND ANNUITY ASSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW J. MYTELKA*
STEVE WINDSOR
GREER, HERZ & ADAMS, LLP
One Moody Plaza 18th Floor
Galveston, Texas 77550
(409) 797-3200
(409) 766-6424 (facsimile)

Attorneys for Petitioner

**Counsel of Record*

Date November 16, 2004

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QUESTION PRESENTED

Whether the deadline for filing a notice of appeal is tolled in accordance with Federal Rule of Appellate Procedure 4(a)(4)(A) by a motion titled "Rule 59(e) Motion to Amend or Alter Judgment" seeking reversal of the final judgment's costs award.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are Moody National Bank (formerly, Moody National Bank of Galveston) and GE Life & Annuity Assurance Company. The attorneys representing Moody National Bank are: Andrew J. Mytelka and Steve Windsor. The attorneys representing GE Life and Annuity Assurance Company are: Andrew Whitaker and Raymond Walker.

CORPORATE DISCLOSURE STATEMENT

Moody National Bank (previously Moody National Bank of Galveston) is 97.8% owned by Moody Bank Holding Company, Inc., a Nevada corporation, which in turn is 100% owned by Moody Bancshares, Inc., a Texas corporation. None of these entities are publicly traded or owned 10% or more by any publicly traded corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Moody National Bank seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS OF ORDERS ENTERED IN THIS CASE

Moody National seeks review of *Moody Nat'l Bank of Galveston v. GE Life and Annuity Assur. Co.*, 2004 U.S. App. Lexis 18971 (Aug. 24, 2004, as revised September 13, 2004). App. 1. The district court order appealed to the Fifth Circuit is *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assur. Co.*, 270 F.Supp.2d 875, 2003 U.S. Dist. Lexis 11742 (S.D. Tex. 2003). App. 10.

BASIS FOR JURISDICTION

(1) The Fifth Circuit Court of Appeals judgment sought to be reviewed was entered on August 24, 2004; (2) Rehearing was not sought; (3) This petition is not a cross-petition; and (4) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE OR RULE INVOLVED

Federal Rule of Appellate Procedure 4(a)(4)(A) is set forth in the Appendix at page 29.

BACKGROUND

Plaintiff Moody National Bank (Moody National) brought its claims against Defendant GE Life & Annuity Assurance Company (GE Life) in state court. GE Life removed the action to federal court based on diversity jurisdiction pursuant to 28 U.S.C. § 1441 on July 26, 2002.

GE Life filed a motion for summary judgment, seeking summary disposition on the merits and costs, on November 11, 2002. The district court granted GE's request for summary disposition on the merits, but ordered each party to bear its own taxable costs and expenses, on June 27, 2004. App. 10. The court entered a final judgment on the same day specifying that "each party is to bear its own taxable costs, expenses and attorney's fees incurred herein to date." App. 23.

GE Life then filed a motion titled Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e), seeking amendment of the costs award, on July 14, 2003. The district court denied the motion on July 29, 2004. App. 24. Moody National filed a notice of appeal on August 27, 2003. GE Life filed a cross appeal to challenge the costs award on September 9, 2003.

Several days before the filing deadline for GE Life's appellee/cross-appellant brief, GE Life withdrew its cross appeal. In its appellee's brief, GE Life argued that the court of appeals was without jurisdiction, asserting Moody National's notice of appeal was untimely. The appeal was dismissed for want of jurisdiction by the Fifth Circuit Panel on August 24, 2004.

REASONS A WRIT SHOULD ISSUE

Any award reduced to judgment should be tolled by a properly filed Federal Rule of Civil Procedure 59(e) motion pursuant to Federal Rule of Appellate Procedure Rule 4(a)(4)(A). The appellate rule provides:

> If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion . . . (iv) to alter or amend the judgment under Rule 59.

Post-judgment motions for attorneys' fees or costs are not Rule 59 motions and thus not subject to Rule 4(a)(4)(A)'s tolling. However, costs and attorneys' fees ordered in a final judgment present a different circumstance. The two decisions providing the primary grounds for the Panel's opinion, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) and *Samaad v. City of Dallas*, 922 F.2d 216 (5th Cir. 1991), are distinguishable from the circumstances presented in Moody National's appeal. In neither *Budinich* nor *Samaad* was the determination of the liability for, and the amount of, attorneys' fees and costs incorporated in the district court's final judgment.

Unlike the Fifth Circuit's decision in the instant case, several appellate court decisions articulate the rule that a challenge to attorneys' fees or costs incorporated in a final judgment is properly raised in a motion pursuant to Federal Rule of Civil Procedure 59(e).

In *Hastert v. State Bd. of Elections*, for example, the Seventh Circuit held:

> Characterizing the November 6 opinion as a final decision both on the merits and as an award of

> attorneys' fees has important jurisdictional consequences. Specifically, if the parties wished to challenge such a denial of attorneys' fees they had only two choices. They could appeal the decision within thirty days, or they could toll the time for appeal by filing a Rule 59(e) motion to alter or amend judgment within ten days, exclusive of weekends and holidays.

Hastert, 28 F.3d 1430, 1438 (7th Cir. 1993). The challenge of the attorneys' fees award incorporated in the final judgment was tolled by the timely filing of a Rule 59(e) motion. The court recognized that a motion for attorneys' fees ordinarily is not proper for a Rule 59(e) motion, "but because we have adopted the district court's view that it considered and denied attorneys' fees in its November 6 [final judgment] opinion, the later petition for such fees must be construed as a Rule 59(e) motion." *Id.* at 1439. The court further noted that, as a rule, only substantive motions served within ten days of the entry of judgment are treated as filed under Rule 59(e), and concluded that the request for attorneys' fees was substantive because "it asked the district court to reverse its earlier denial of fees." *Id.* at 1439 n.8.

Similar reasoning was articulated in *Matei v. Cessna Aircraft Co.,* 35 F.3d 1142 (7th Cir. 1995). The court observed that the party seeking to challenge the costs award "waived its claim for costs when it failed to file a motion to alter or amend judgment within the ten days provided under FED. R. CIV. P. 59(e)." *Id.* at 1147.

Indeed, the distinction between a motion for costs or attorneys' fee, and a challenge of the judgment's award of costs or attorneys' fees, was discussed at some length by

Fifth Circuit in *Ramsey v. The Colonial Life Ins. Co. of America,* 12 F.3d 472 (5th Cir. 1994):

> The difficulty . . . arises out of the Supreme Court's decision in *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196 (1988). In that case, the Court announced that a request for attorney's fees will not prevent an otherwise final decision on the merits from becoming final for purposes of appeal. The *Budinich* opinion relies heavily on *White v. New Hampshire Dep't of Employment Security,* 455 U.S. 445 (1982), which sets out the principle that a request for attorney's fees was not a Rule 59(e) motion. *See also Knight v. Watkins,* 616 F.2d 795, 797 (5th Cir. 1980) ("a motion for attorney's fees is unlike a motion to alter or amend a judgment . . . [and so] is, therefore, not governed by the provisions of 59(e)"). The Court in *White* reasoned that a request for attorney's fees is a collateral issue akin to a motion for costs and does not amend or alter a judgment on the merits . . .
>
> We believe that the motion to reconsider attorney's fees under consideration here is distinguishable from both *White* and *Budinich* because the motion, unlike the cases presented to the Supreme Court, is not an original request for attorney's fees. Instead we have a case in which the district court, as part of its final judgment on the merits, has already passed on and denied the plaintiff's motion for attorney's fees. Thus, plaintiff's motion was not an original request for fees but instead was a motion for reconsideration of a final judgment where the subject matter of that motion happened to focus on the question of attorney's fees.

> In *Charles v. Daley,* 799 F.2d 343, 347 (7th Cir. 1986) the Seventh Circuit, in an analogous situation, ruled that a request to clarify the court's order with regard to attorney's fees to alter the parties responsible for those fees was considered a Rule 59(e) motion which effectively tolled the thirty day time limitation for filing appeals. The *Charles* court cited with approval our decision in *Harcon Barge Co. v. D&G Boat Rentals, Inc.,* 784 F.2d 655 (5th Cir. 1986), in which we held that a "motion that calls into question the correctness of a judgment should be treated as a motion under Rule 59(e), however it is styled."

Ramsey, 12 F.3d at 476-77.

GE Life, like the *Ramsey* movant, challenged an award that had already been expressly denied in the final judgment. GE's motion to alter or amend judgment was not an original request for costs that were due under the judgment. Thus, by its motion to alter or amend, GE sought more than determination of relief due as a natural consequence of the final judgment. Rather, GE directly challenged part of the final judgment. *See Utah Women's Clinic, Inc. v. Leavitt,* 75 F.3d 564, 568 (10th Cir. 1995) ("We do not think that *Ramsey* was meant to apply where the Rule 59(e) motion is directed to a merits judgment awarding both attorney's fees and costs which will be quantified at some future date. *Ramsey* pertains to a Rule 59(e) motion where the judgment was final not only as to the merits, but also as to attorney's fees.").

By holding that GE Life's motion challenging the costs award portion of the final judgment is not cognizable under Rule 59(e), the Fifth Circuit creates a new and unnecessary appellant "trap." Denying GE Life's motion "Rule 59" status is unnecessary because the reasons for

considering a costs or attorneys' fees award "collateral" are not implicated when the costs or attorneys' fees are incorporated with finality in the final judgment.

The goals of the appellate rules, rather, are promoted by the approach articulated in *Hastert* and *Ramsey*. "Federal Rule of Appellate Procedure 4(a)(4) advances a policy favoring conservation of appellate resources..." *Brown v. Local 58 Int'l Brotherhood of Electrical Workers*, 76 F.3d 762, 768 (6th Cir. 1996). Rule 4(a)(4) thus seeks to prevent the filing of futile appeals from orders that might be changed because of subsequent motions to amend or alter judgment. FED. R. APP. P. 4(a)(4) advisory committee's note.

A challenge to the district court's costs award incorporated in the final judgment, such as GE Life's motion to alter or amend, does not implicate the problem of repeated premature appeals that Appellate Rule 4(a)(4) seeks to address. Rather, the Rule 59(e) vehicle promotes the purposes of the Rule 4(a)(4) by allowing a single appeal after the district court disposes of the Rule 59(e) motion – thus avoiding the possibility of two appeals, one of the final judgment and another after determination of the Rule 59(e) motion. The approach articulated in *Hastert* and *Ramsey* allows the court to correct its own errors, sparing the parties and the courts the costs of unnecessary appellate review.

The circumstances of GE Life's Rule 59(e) motion, moreover, demonstrate the inequity of the Fifth Circuit Panel's decision. In bringing its motion to alter or amend judgment, GE Life expressly invoked Federal Rule of Civil Procedure 59(e). The motion was necessarily brought under Rule 59 because the motion was filed outside the

five-day window for bringing a request pursuant to Rule 54.

After Moody National filed a notice of appeal, GE Life filed its own notice of appeal to challenge the district court's denial of its motion to alter or amend the costs award. GE never filed a motion to dismiss Moody National's appeal based upon the absence of appellate jurisdiction. Then, in a sudden about-face, GE Life dismissed its cross appeal days before its appellate brief was due, and argued that its motion to alter or amend was not "really" a Rule 59(e) motion as it had previously asserted. Thus GE Life, in essence, argued on appeal that its Rule 59(e) motion was frivolous and that Moody National was required to guess that the court would ultimately rule that GE Life's motion was frivolous.

The plain language or Appellate Rule 4(a)(4)(A) indicates that GE Life's purposeful invocation of Rule 59(e) to challenge the final judgment tolls the 30-day window for filing a notice of appeal. GE Life's motion to alter or amend judgment therefore falls within the Congressional grant of appellate jurisdiction. Further, in construing various rules of procedure, courts have noted that the rules are not designed as traps for the unwary. *See, e.g., Seiscom Delta, Inc. v. Two Westlake Park,* 857 F.2d 279, 282 (5th Cir. 1988) (discussing FED. R. CIV. P. 58).

Even in circumstances where costs or attorneys' fees have not been incorporated in a final judgment, courts of appeals have articulated concern about confusion surrounding the timeliness for noticing the appeal of costs and attorneys' fees. Recently the Sixth Circuit Court of Appeals commented:

> We cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely. *See generally,* Kenneth J. Servay, *The 1993 Amendments to Rules 3 and 4 of the Federal Rules of Appellate Procedure – a Bridge Over Troubled Water – Or Just Another Trap,* 157 F.R.D. 587, 605 (1994) (noting that the amended Rule 4 "concerning the effect of post-judgment motions for attorney's fees" on the timeliness of a notice of appeal creates a "jurisdictional trap."). The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) *automatically* extend the time to file an appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure.

Wikol v. Birmingham Pub. Sch. Bd. of Edu., 360 F.3d 604, 610 (8th Cir. 2004) (emphasis on the original).

There is no reason for extending the scope of this confusion to instances where a party files a Rule 59(e) motion directly challenging the judgment.

PRAYER

Because the motion at issue directly challenged the district court's final judgment, Moody National prays that this Court review the Fifth Circuit Panel's decision and hold that a challenge to any part of the district court's

final judgment will be tolled by a timely filed Federal Rule of Civil Procedure 59(e) motion pursuant to Appellate Rule 4(a)(4)(A).

Respectfully submitted,

ANDREW J. MYTELKA*
STEVE WINDSOR
GREER, HERZ & ADAMS, LLP
One Moody Plaza 18th Floor
Galveston, Texas 77550
(409) 797-3200
(409) 766-6424 (facsimile)

Attorneys for Petitioner

**Counsel of Record*

Date November 16, 2004

MOODY NATIONAL BANK OF GALVESTON, Plaintiff-Appellant, versus GE LIFE AND ANNUITY ASSURANCE COMPANY, Defendant-Appellee.

03-41237

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

383 F.3d 249; 2004 U.S. App. LEXIS 17971

August 24, 2004, Filed

COUNSEL: For MOODY NATIONAL BANK OF GALVESTON, Plaintiff-Appellant: Andrew Jan Mytelka, Steven Carl Windsor, Greer, Herz & Adams, Galveston, TX.

For GE LIFE AND ANNUITY INSURANCE CO, Defendant-Appellee: Andrew C Whitaker, Figari Davenport & Graves, Dallas, TX.

JUDGES: Before HIGGINBOTHAM, DAVIS, and WIENER, Circuit Judges.

OPINION BY: W. EUGENE DAVIS

OPINION: W. EUGENE DAVIS, Circuit Judge:

Plaintiff, Moody National Bank of Galveston (Moody), filed the instant suit against GE Life and Annuity Assurance Company (GE) seeking to recover the proceeds of a life insurance policy issued by GE to Moody's creditor, Schwartz, Inc. GE argues that Moody's appeal was not timely and seeks to dismiss this appeal for want of jurisdiction. Because Moody did not file a timely notice of appeal, we conclude that we do not have jurisdiction to consider the appeal.

I.

On June 30, 2003, the district court granted GE's motion for summary judgment and entered final judgment in favor of GE. In the last sentence of its final judgment, the district court sua sponte ordered each party to pay its own costs and attorney's fees. On July 14, 2003, GE filed a motion styled "Motion to Alter or Amend the Judgment under Federal Rule of Civil Procedure 59(e)." The only relief GE sought in the motion was to have the court tax all costs, including GE's against Moody Bank. The district Court denied GE's motion on July 30, 2003. Moody filed a Notice of Appeal on August 27, 2003.

II.

A timely filed notice of appeal is an absolute prerequisite to this court's jurisdiction. *Browder v. Director, Dep't of Corrections,* 434 U.S. 257, 54 L. Ed. 2d 521, 264, 98 S. Ct. 556 (1978). Generally, to be timely, a notice of appeal in a civil case must be filed within 30 days after the judgment or order appealed from is entered. Fed.R.App.P. 4(a)(1)(A).[1] However, a timely filed Rule 59(e) motion to amend or reconsider will toll the time for filing an appeal until the district court disposes of the motion. Fed.R.App.P. 4(a)(4)(A)(iv).[2] Motions addressing costs and attorney's

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[1] Fed.R.App.P. 4(a)(1)(A) provides:

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

[2] Fed.R.App.P. 4(a)(4)(A)(iv) provides, in pertinent part:

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure,

(Continued on following page)

fees, on the other hand are generally made pursuant to Rule 54, are considered collateral to the judgment, and do not toll the time period for filing an appeal. Fed.R.Civ.P 54(d).[3]

Moody argues that even though the only relief GE sought in its motion was that all costs be assessed against Moody, it was nevertheless a Rule 59(e) motion to alter or amend. Moody contends that this is true because the district court's ruling that each party should bear its own costs and attorney's fees was included in the final judgment. Moody argues that under *Ramsey v. Colonial Life Ins. Co. of America,* 12 F.3d 472 (5th Cir. 1994), where the district court makes costs part of a final judgment, a post-judgment motion to alter those costs will be characterized as a Rule 59(e) motion and toll the time limit for filing an appeal.

As an initial matter, it is important to make clear that the fact that GE labeled its motion as a Rule 59(e) motion

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the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * *

(iv) to alter or amend the judgment under Rule 59.

[3] Fed.R.Civ.P. 54(d) provides, in pertinent part:

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs[.]

(2) Attorneys' Fees.

(A) Claims for attorneys' fees and related non-taxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

to alter or amend is immaterial; a motion's substance, and not its form, controls. *Edwards v. City of Houston,* 78 F.3d 983, 995 (5th Cir. 1996) (en banc). Thus, the only question is whether a motion to allocate costs, that would otherwise be characterized as a Rule 54(d) motion, becomes a Rule 59(e) motion to alter or amend where the district court awarded costs as part of its final judgment.

In *Budinich v. Becton Dickinson and Co.,* 486 U.S. 196, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988), the Supreme Court was faced with the question of whether a post-judgment motion for attorney's fees should be considered a Rule 59(e) motion where the fees are authorized by the statute sued upon. *Budinich,* 486 U.S. at 201. The plaintiff argued that because the statute authorized attorney's fees, his motion for fees was a request to alter the judgment rather than a collateral request for fees under Rule 54(d). Rejecting this argument, the Court first pointed out the collateral nature of an award of attorney's fees:

> As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action.

Budinich, 486 U.S. at 200. The Court continued, explaining that any attempt to distinguish between the merits or non-merits of an award of fees that did not themselves give rise to the action would not be beneficial:

> [N]o interest pertinent to [finality] is served by according different treatment to attorney's fees deemed part of the merits recovery[.] . . . The

> time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of [28 U.S.C.] § 1291[.]

Id. 486 U.S. at 202.

This court was faced with a situation similar to *Budinich* in *Samaad v. City of Dallas,* 922 F.2d 216 (5th Cir. 1991). In *Samaad,* the plaintiffs' counsel filed a post-judgment motion to allocate costs. Plaintiffs' counsel also filed a notice of appeal within thirty days of entry of the district court's judgment; however, the appeal only named the lead plaintiff. Following the district court's order granting the motion for costs, the plaintiffs filed an amended notice of appeal which listed all remaining plaintiffs by name. Relying on *Budinich,* this court concluded that it only had jurisdiction to hear the appeal of the lead plaintiff because the amended notice of appeal was untimely. In reaching this conclusion, we pointed out that *Budinich* "made it patent that a motion for costs or attorney's fees is not to be deemed a Rule 59 motion, even where the cost or fee award might be viewed as an integral part of the merits." *Id.* at 218.

Subsequent to *Samaad,* this court decided *Ramsey v. Colonial Life Ins. Co. of America,* 12 F.3d 472 (5th Cir. 1994), which Moody argues supports its contention that GE's motion was in fact a Rule 59(e) motion.

In *Ramsey,* an injured insured sued his insurer after the insurer refused to continue paying his medical bills. Plaintiff moved for summary judgment and also filed a motion for attorney's fees. The district court granted summary judgment in favor of the plaintiff and, in the same order, denied the plaintiff's motion for attorney's fees. Following entry of final judgment, plaintiff filed a Rule 59(e) motion asking the court to reconsider the issue of attorney's fees. Plaintiff did not file an appeal within 30 days because he believed the Rule 59(e) motion would toll the filing period. On appeal, the defendant argued that under *Budinich* the plaintiff's appeal was untimely because the Rule 59(e) motion was really a Rule 54(d) motion for attorney's fees that did not toll the time for filing an appeal. This court disagreed, concluding that *Budinich* was distinguishable because it involved an "original request for attorney's fees" not ruled upon by the district court in its final judgment, whereas in *Ramsey* "the district court, as part of its final judgment on the merits, had already passed on and denied the plaintiff's motion for attorney's fees. Thus, plaintiff's motion was not an original request for fees but instead was a motion for reconsideration[.]" *Ramsey,* 12 F.3d at 476-477.

The holding and reasoning of *Ramsey* is arguably in tension with the goal of the Supreme Court in *Budinich* that "no interest is served by according different treatment to attorney's fees deemed part of the merits recovery." *Budinich,* 486 U.S. at 202. As a general matter, any misgivings we may have about the correctness of *Ramsey* are immaterial because we are bound to follow the prior panel rulings of this court. *United States v. Darrington,* 351 F.3d 632, 634 (5th Cir. 2003). This rule is inapplicable, however, where Congress makes a change in statutory law

that directly affects a prior panel opinion. *Arbaugh v. Y & H Corp.*, U.S. App. LEXIS 15842, 380 F.3d 219, 2004 WL 1717531 (5th Cir. Aug. 2, 2004) (quoting *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976)).

In 1993, Appellate Rule 4(a)(4) was amended to include among the motions that will toll the time for filing a notice of appeal motions for attorney's fees under Rule 54 *if* the district court extends the time to appeal under Rule 58. Fed.R.App.P. 4(a)(4)(A)(iii).[4] This amendment was not considered by the court in *Ramsey*.[5] The Advisory Committee Notes to the 1993 Amendment state, in pertinent part:

> To conform to a recent Supreme Court decision . . . – *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988) – the amendment *excludes* motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal.

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[4] Fed.R.App.P. 4(a)(4)(A)(iii) provides, in pertinent part:

> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> * * *
>
> (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58[.]

[5] Although this amendment went into effect almost two months prior to the release of *Ramsey*, it is clear that *Ramsey* did not consider the amendments to Rule 4(a)(4) or the relevant comments thereto in reaching its decision. *Ramsey*, 12 F.3d at 476 n. 5 (citing the text of old Rule 4(a)(4)).

Advisory Committee Notes, Fed. R. App. P. 4, 1993 Amendments (emphasis added). Advisory Committee Notes do not have the force of law, but they are instructive in determining Congress's intent in amending a statute. *United States v. Navarro,* 169 F.3d 228, 237 (5th Cir. 1999).

Although the relevant amendment to Appellate Rule 4(a)(4) provides only that a post-judgment motion relating to attorney's fees may suspend the time for filing notice of appeal, the silence of the rule on the effect of a motion addressing costs is instructive. Rule 4(a)(4) refers to Rule 58. Rule 58(c)(1), in turn, provides: "Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2)." Fed. R. Civ. P 58(c)(1). Rule 58(c)(2) then provides for the limited circumstance under which a post-judgment motion for attorney's fees will extend the time for appeal and makes no provision for extending the time for appeal relating to taxing of costs. Because Rule 58(c)(2) is silent on post-judgment motions addressing costs, the intent of the rule is clear: a post-judgment motion addressing costs will not extend the time for appeal.

Thus, reading (4)(a)(4) and the rule it refers to – Rule 58 – together, it is clear to us that any post-judgment motion addressing costs or attorney's fees must be considered a collateral issue even when costs or attorney's fees are included in a final judgment. Post judgment motions addressing attorney's fees can only extend the time for appeal if (1) the motion is filed before the delay for appeal expires and (2) the court orders that the motion be considered

as a Rule 59 motion.[6] Furthermore, because 58(c)(2) does not give the district court authority to consider a post-judgment motion for costs as a Rule 59 motion, such a motion addressing costs cannot extend the time for appeal.

For these reasons, we conclude that GE's motion to allocate costs was not a motion to alter or amend judgment under Rule 59(e), but was rather a collateral motion for costs under Rule 54(d) that did not toll the time for filing an appeal. Because Moody's appeal was filed 58 days after the district court entered its final judgment, it is untimely and we dismiss Moody's appeal for lack of jurisdiction.

DISMISSED.

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[6] We recognize that this reasoning would not apply where the non-payment of attorney's fees was "the injury giving rise to the action." *Budinich*, 486 U.S. at 200. In such a case, the issue of attorney's fees would be the merits, rather than merely a collateral issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MOODY NATIONAL BANK OF GALVESTON Plaintiff, v. GE LIFE AND ANNUITY ASSURANCE COMPANY Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. G-02-531

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Jun. 30, 2003)

Plaintiff Moody National Bank of Galveston ("Moody Bank" or "Bank") brings this lawsuit against Defendant GE Life and Annuity Assurance Company ("GELAAC") seeking to recover $499,212.19 that GELAAC allegedly owed to Moody Bank upon the death of Ronald M. Schwartz ("Schwartz") on April 6, 2002. Now before the Court is GELAAC's Motion for Summary Judgment, Moody Bank's timely Response, and GELAAC's timely Reply. For the reasons articulated below, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DISMISSES** the case **WITH PREJUDICE**.

I. Factual Background

In November of 1986, The Life Insurance Company of Virginia, GELAAC's predecessor, issued a life insurance policy ("Policy") on the life of Ronald Schwartz. The Policy had a face value of $500,000.00 and was issued to

Schwartz's company, Schwartz, Inc. In 1989, Schwartz, Inc. sought to obtain a loan, including a line of credit, from Moody Bank. Victor Pierson, a loan officer with Moody Bank, recommended a $375,000.00 loan and a $50,000.00 line of credit, which the Loan Committee approved. As collateral, the Bank required – among other things – that Schwartz, Inc. assign to it a life insurance policy on Schwartz's life with a value of $400,000.00. In a document entitled Assignment of Life Insurance Policy as Collateral ("Assignment"), signed May 30, 1990 and acknowledged by GELAAC on June 29, 1990, Schwartz, Inc. assigned certain rights under the Policy to Moody Bank. The Assignment, which covered existing and future obligations of Schwartz, Inc. to Moody Bank, was made "subject to all the terms and conditions of the Policy and to all superior liens, if any, which the Insurer may have against the Policy." The Assignment explicitly provided that "[Moody Bank] shall be under no obligation to pay any premium," and GELAAC "shall not be obligated to notify [Moody Bank] regarding failure to pay premiums, lapse of the policy or exercise of any nonforfeiture option."

In December of 1990, Moody Bank renewed Schwartz, Inc.'s loan and increased its line of credit from $50,000.00 to $400,000.00. The assignment of Schwartz's life insurance policy remained required collateral. Although the Assignment signed in May of 1990 and acknowledged in June of 1990 covered existing and future liabilities, Moody Bank nevertheless sent another assignment document to GELAAC for acknowledgment. On February 11, 1991, in response to the request for a second acknowledgment of the assignment, Teresa Brissette, a GELAAC employee, sent the Bank the following letter ("1991 Letter"), which stated in its entirety:

Dear Sirs:

As requested, the following change(s) have been recorded on the above policy(s), thereby revoking all prior designations.

Our records indicate that this policy is assigned to your bank. We are returning the attached Assignment unacknowledged. At the Insured's death, the total amount of indebtedness will be paid to Moody National Bank.

If you should have any questions, please write or call me at our Home Office. We appreciate your business and look forward to serving you.

Sincerely,
Teresa Brissette
Extension 6940
Title Team
Policyowner Service

Moody Bank did not call or write GELAAC to ask any questions. In fact, from February 1991 until early 2002, Moody Bank did not communicate with GELAAC. However, Moody Bank now claims that this letter constituted an irrevocable promise by GELAAC to pay the Bank the entire amount of Schwartz, Inc.'s indebtedness to the Bank upon Schwartz's death, regardless of the status of the Assignment or the Policy at that time (i.e., *even if* the Policy had lapsed, which, in fact, occurred).

In August of 1993, Pierson prepared an application to consolidate Schwartz, Inc.'s business loan and line of credit into one loan for $539,242.35. Pierson listed two new sources of collateral on the application: subordination of Schwartz's interest in a note payable to him by his company, and assignment of Schwartz's interest in his

father's estate. Notably, Pierson did not include GELAAC's "irrevocable promise" to pay the *entire amount* of Schwartz, Inc.'s indebtedness. Pierson prepared *another* assignment document, but it is unclear whether this document was ever sent to GELAAC for acknowledgment. During the life of its loan to Schwartz, Inc., Moody Bank made periodic assessments of the loan, but none of the records regarding the loan refer to the alleged unconditional promise by GELAAC to pay the entire amount of Schwartz, Inc.'s debt to the Bank.

Schwartz, Inc. was often late paying the premiums on the Policy, and GELAAC, on numerous occasions, sent notices to the company notifying it that the Policy was in danger of lapsing. For example, on August 6, 1997, the Policy lapsed due to Schwartz, Inc.'s failure to pay its premium. GELAAC sent the company a letter notifying it of the lapse and describing the requirements for reinstating the Policy. Schwartz, Inc. complied with these requirements, and the Policy was reinstated in December of 1997. On April 6, 1999, the Policy again lapsed for failure to pay the premiums. GELAAC again sent a letter notifying Schwartz, Inc. of the lapse and the steps for reinstating the Policy, but the company did not respond, and the Policy was not reinstated.

In early 2002, Schwartz was near death, and Moody Bank contacted GELAAC to find out how to collect. GELAAC told the Bank that the Policy had lapsed in 1999. The Bank, through its lawyers, complained that GELAAC never notified it of the lapse or the termination, and the Bank demanded that GELAAC reinstate the Policy. On April 6, 2002, before GELAAC accepted or rejected the Bank's demand, Schwartz died. On May 1, 2002, Moody Bank sent GELAAC a letter demanding payment of

$499,212.19. GELAAC refused to pay, and Moody Bank brought this lawsuit.

II. Analysis

A. *Summary Judgment Standard*

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.,* 477 U.S. at 248, 106 S. Ct. at 2510. The mere *existence* of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.,* 477 U.S. at 247-48, 106 S. Ct. at 2510. If the evidence is such that a reasonable fact finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Dixon v. State Farm Fire & Cas. Co.,* 799 F. Supp. 691, 694 (S.D. Tex. 1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing evidence, and drawing reasonable inferences are

left to the trier of fact. *See Anderson,* 477 U.S. at 255, 106 S. Ct. at 2513.

Procedurally, the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323, 106 S. Ct. at 2553; *see also* Fed. R. Civ. P. 56(c). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *See Matsushita,* 475 U.S. at 585-87, 106 S. Ct. at 1355-56; *Wise v. E.I. DuPont De Nemours & Co.,* 58 F.3d 193, 195 (5th Cir. 1995). The Court accepts the evidence of the nonmoving party and draws all justifiable inferences in favor of that party. *See Matsushita,* 475 U.S. at 585-87, 106 S. Ct. at 1355-56.[1]

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[1] Moody Bank objects to the declaration of William E. Daner ("Daner"), tendered to the Court by GELAAC in support of its Motion for Summary Judgment. Moody Bank asks the Court to strike Daner's declaration (1) because GELAAC failed to identify Daner, an associate general counsel at GELAAC, as a "person with knowledge" of discoverable information in its initial disclosures, and (2) because Daner's declaration is not relevant to the disputed issues. As this Court has stated, Rule 56 of the Federal Rules of Civil Procedure contains no requirement that "that affiants be disclosed prior to filing a summary judgment motion. . . ." *Conn. Gen. Life Ins. Co. v. Thomas,* 910 F. Supp. 297, 303 (S.D. Tex. 1995) (Kent, J.). Moody Bank presents no evidence that Daner's declaration was presented in bad faith or solely for the purpose of delay. *See* Fed. R. Civ. P. 56(g); *see also Thomas,* 910 F. Supp. at 303 n. 8 ("In fact, it is difficult for the Court to envision a situation where affidavits filed by a party in support of that party's motion for summary judgment could somehow delay the resolution of a case. It seems to the Court that only affidavits submitted in opposition to a summary judgment motion could delay the resolution of a case, by falsely creating an issue of fact and thus precluding the granting of summary judgment."). Further, under the Docket Control order in this case, discovery did not close until June 20, 2003. Moody Bank has had

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B. Breach of Contract

GELAAC argues that Moody Bank cannot recover for breach of the insurance contract. Moody Bank responds that its lawsuit is not based on a breach of contract theory. Thus, the Court will only briefly address GELAAC's argument. Moody Bank claims that it is entitled to payment from GELAAC based on one sentence in the three-paragraph 1991 Letter, which was written to refuse acknowledgment of Moody Bank's duplicative collateral assignment document. That sentence states, "At the Insured's death, the total amount of indebtedness will be paid to Moody National Bank." Certainly, if this had been intended as an unconditional agreement to repay the loan, regardless of the continuation of the Policy, it would have changed the existing agreement between the Parties (the Assignment), which was explicitly made "subject to all the terms and conditions of the Policy." But such an attempted modification would have been ineffective because "Texas law is clear that for a contractual modification to be effective, 'it must satisfy the elements of a contract: a meeting of the minds supported by consideration.'" *Scenic Galveston, Inc. v. Infinity Outdoor, Inc.*, 151 F. Supp. 2d 812, 817 (S.D. Tex. 2001) (quoting *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986)). "Consideration is a present exchange bargained for in return for a promise. It consists of either a benefit to the promisor or a detriment to the promisee. The detriment must induce the making of the promise, and the promise must induce the incurring of the detriment." *Roark v. Stallworth Oil &*

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ample time to cope with any surprise created by the Daner declaration. Thus, the Court will consider the declaration to the extent it is relevant.

Gas, Inc., 813 S.W.2d 492, 496 (Tex. 1991) (internal citations omitted). Here, the Bank alleges that GELAAC simply made an unconditional promise to pay off Schwartz, Inc.'s debt. The Bank does not allege that it offered anything in return for this promise, and there is no evidence of consideration in the record. Thus, the Court agrees that to the extent the 1991 Letter is alleged to be a modification of the existing contract – the Assignment – it fails for lack of consideration.

B. Promissory Estoppel

The theory under which Moody Bank seeks to recover is promissory estoppel. The Bank claims that it detrimentally relied on GELAAC's alleged unconditional promise to repay the total amount of Schwartz, Inc.'s indebtedness to the Bank upon Schwartz's death. "The requisites of promissory estoppel are: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *English v. Fischer,* 660 S.W.2d 521, 524 (Tex. 1983); *see Bailey v. City of Austin,* 972 S.W.2d 180, 192 (Tex. App. – Austin 1998, pet. denied) ("Although promissory estoppel is normally a defensive theory, it may be asserted by a plaintiff as an affirmative ground for relief."). The claimed reliance must be both reasonable and justified. *See Gilmartin v. KVTV-Channel 13,* 985 S.W.2d 553, 558 (Tex. App – San Antonio 1998, no pet.).

The sole basis for the Bank's claim against GELAAC is the one-page 1991 Letter's middle paragraph, which states in its entirety: "Our records indicate that this policy is assigned to your bank. We are returning the attached Assignment unacknowledged. At the Insured's death, the

total amount of indebtedness will be paid to Moody National Bank." The Bank incredibly asserts that by this paragraph *GELAAC* promised to pay the entire amount that *Schwartz, Inc. owed the Bank* upon Schwartz's death, *regardless* of the status of Schwartz's life insurance policy with GELAAC. However, the Court finds it *much* more likely that when GELAAC stated that "[a]t the Insured's death, the total amount of indebtedness will be paid to Moody National Bank," GELAAC meant that it would pay the total amount of *its* indebtedness, the only source of which could be the Policy. Because the Policy lapsed, the amount of GELAAC's indebtedness at Schwartz's death was *nothing*. Any other reading of the sentence is manifestly unreasonable.

However, assuming for the sake of argument that such a promise was made, the Court finds that Moody Bank has also failed to create a fact issue regarding its alleged reliance. The Bank's purported interpretation of the 1991 Letter-that is, that GELAAC would pay Schwartz, Inc's debt to the Bank in full-would have rendered unnecessary any other sources of collateral. However, as GELAAC points out, the Bank never listed the letter as a source of collateral on any document. Further, in 1992, after the receipt of GELAAC's alleged promise to pay the entire debt, the Bank downgraded its loans to Schwartz, Inc. twice, first to level "D", meaning that the loans were "inadequately protected by the current worth and paying capacity of the obligor *or collateral*" (emphasis added), and then to level "E," meaning that the loans were "exhibiting weaknesses which make collection in full highly questionable and improbable." If the Bank truly relied on the 1991 Letter as an unconditional promise by GELAAC to repay Schwartz, Inc.'s debt in full, why did

the Bank (a) never list the 1991 Letter as a source of collateral, (b) list the loans as inadequately protected by collateral, and (c) determine that collection in full was improbable? The Bank's only response to this overwhelming showing that it did not rely on the 1991 Letter is Pierson's testimony that, in fact, he and the Bank did rely on the Letter. Reliance is not established by alleging feelings and beliefs, but by showing actions or forbearance in light of the promise. *See Wheeler v. White,* 398 S.W.2d 93, 97 (Tex. 1965) ("[W]here the promisee has *acted* in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained.") (emphasis added); *see also, e.g., Pair-A-Dice Acquisition Partners, Inc. v. Bd. of Trs. of Galveston Wharves,* 185 F. Supp. 2d 703, 708 (S.D. Tex. 2002) (Kent, J.) ("Although promissory estoppel is normally a defensive theory, Texas law provides that it is an available cause of action for a promisee who *acted* to its detriment in reasonable reliance on an otherwise unenforceable promise."). Thus, the Court finds that Pierson's bald assertion that he relied on the alleged promise does not create a fact issue. *See, e.g., Matsushita,* 475 U.S. at 585-87, 106 S. Ct. at 1355-56 (stating that the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts," but instead, must "come forward with 'specific facts showing that there is a genuine issue for trial'") (quoting Fed. R. Civ. P. 56(e)).

Further, assuming solely for the sake of argument that the Bank did rely on the letter, such reliance was unreasonable. *See Gilmartin,* 985 S.W.2d at 558. First, the Court must note that it is almost inconceivable that GELAAC would make such a tremendous gratuitous

promise to the Bank in *exchange for nothing* and *without negotiation*. The Court also notes that the Assignment that governed the Parties' relationship was explicitly "subject to all the terms and conditions of the Policy," and explicitly stated that "[GELAAC] shall not be obligated to notify [Moody Bank] regarding failure to pay premiums [or] lapse of the Policy." Upon receipt of the 1991 Letter, which the Bank allegedly interpreted as a sudden, unilateral, incredibly generous promise to forget about the Assignment and the Policy and simply pay in full another party's debts to the Bank, the Bank did nothing to follow up-it did not seek to clarify whether GELAAC was actually making such an extraordinary change in the Parties' relationship. The Bank did not write or call with questions regarding this complete revision of the Parties' obligations as the author of the 1991 Letter asked. The Court finds such behavior on the Bank's part unreasonable as a matter of law. *Cf. Brock v. Baskin Robbins, USA, Co.*, No. 5:99-CV-274, 2003 WL 21309428, at *4-5 (E.D. Tex. Jan. 17, 2003) (granting the defendant's motion for summary judgment where the plaintiffs' only evidence of reliance on statements that contradicted the contract were the plaintiffs' self-serving affidavits).

Finally, the Court finds that Moody Bank has failed to create a fact issue regarding any damages it might have suffered as a result of its alleged reliance on the alleged promise. When asked whether the 1991 Letter "had any impact on the Bank's willingness to lend additional money to Schwartz, Inc." Pierson replied that it did not. Further, the Bank did not lend any additional money to Schwartz, Inc. after receiving the 1991 Letter. Given that the Bank did not lend any more money to Schwartz, Inc. as a result

of the alleged promise, the Court is unclear what reliance damages the Bank is claiming it suffered.

C. Negligent Misrepresentation

Moody Bank also brings a cause of action against GELAAC for negligent misrepresentation. "The elements of negligent misrepresentation are (1) a representation made by the defendant in [the] course of the defendant's business, or in a transaction in which the defendant has a proprietary interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or [communicating] the opinion; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation." *TIG Ins. Co. v. Sedgwick James of Washington,* 276 F.3d 754, 763 (5th Cir. 2002) (citing *Fed. Land Bank Ass'n v. Sloane,* 825 S.W.2d 439, 442 (Tex. 1991)). The final element "has two aspects: 'the plaintiff must in fact have relied; and this reliance must have been reasonable.'" *Clardy Mfg. Co. v. Marine Midland Bus. Loans, Inc.,* 88 F.3d 347, 358 (5th Cir.1996) (quoting *Geosearch, Inc. v. Howell Petroleum Corp.,* 819 F.2d 521, 526 (5th Cir. 1987) (applying Texas law)). "In other words, 'there must be a reasonable relation between the contents of the defendant's misrepresentation and the action the plaintiff took in reliance.'" *Id.* (quoting *Geosearch,* 819 F.2d at 526). "'The justifiableness of the reliance is judged in light of the plaintiff's intelligence and experience.'" *Id.* (quoting *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.,* 81 F.3d 606, 615 (5th Cir. 1996)). As the Court explained when analyzing the promissory estoppel claim, Moody Bank has not raised a fact question concerning its actual reliance on the alleged

representation. Further, the Court has determined that any reliance was unreasonable, particularly when judged in light of the Bank's presumed intelligence and experience. Finally, as the Court discussed, Moody Bank has failed to show any action or inaction that it took in reliance on the alleged promise or misrepresentation that resulted in a pecuniary loss. Thus, the Bank's negligent misrepresentation claim must also fail.

III. Conclusion

For all of the reasons set forth above, the Court hereby **GRANTS** Defendant's Motion for Summary Judgment and **DISMISSES WITH PREJUDICE** each and every one of Plaintiff's claims against Defendant. Each Party is to bear its own taxable costs and expenses incurred herein to date.

IT IS SO ORDERED.

DONE this 27th day of June 2003, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MOODY NATIONAL BANK OF GALVESTON Plaintiff, v. GE LIFE AND ANNUITY ASSURANCE COMPANY Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. G-02-531

FINAL JUDGMENT

(Filed June 30, 2003)

As set forth in the Order Granting Defendant's Motion for Summary Judgment issued this date, any and all of Plaintiff's claims against Defendant are hereby **DISMISSED WITH PREJUDICE**. Each Party is to bear its own taxable costs, expenses, and attorney's fees incurred herein to date. **THIS IS A FINAL JUDGMENT.**

IT IS SO ORDERED.

DONE this 27th day of June 2003, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MOODY NATIONAL BANK OF GALVESTON Plaintiff, v. GE LIFE AND ANNUITY ASSURANCE COMPANY Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. G-02-531

ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

(Filed Jul. 30, 2003)

Plaintiff Moody National Bank of Galveston ("Moody Bank") brought this lawsuit against Defendant GE Life and Annuity Assurance Company ("GELAAC") seeking to recover $499,212.19 that GELAAC allegedly owed to Moody Bank upon the death of Ronald M. Schwartz ("Schwartz"). GELAAC filed a Motion for Summary Judgment in the case, which this Court granted on June 30, 2003. In granting the Motion, the Court stated that each Party was to bear its own taxable costs and expenses. On July 14, 2003, GELAAC, the prevailing party, filed a Motion to Alter or Amend Judgment, asking the Court to tax all costs against Moody Bank. The Bank timely responded. For the reasons articulated below, the Court **DENIES** Defendant's Motion to Alter or Amend Judgment.

I. Analysis

The Court denies GELAAC's request for the Court to tax all costs against Moody Bank because GELAAC's request is unwarranted and untimely. Rule 54 of the Federal Rules of Civil procedure states

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party *unless the court otherwise directs;*. . . . Such costs may be taxed by the clerk on one day's notice. On *motion served within 5 days thereafter*, the action of the clerk may be reviewed by the court.

Fed R. Civ. P. 54(d)(1) (emphasis added). It is within the Court's discretion to decide to award costs to the prevailing party. *See id.; see also Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210, 216 (5th Cir. 1991) ("A trial judge has wide discretion with regard to the costs in a case and may order each party to bear his own costs."); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 999 (5th Cir. 1976) ("Rule 54(d) does not give the district court the power to award costs to the nonprevailing party, but only gives that court discretion to order that each party bear part or all of its own costs."). Because this Court's June 30 Order Granting Defendant's Motion for Summary Judgment did not explicitly state the Court's reasons for ordering each Party to bear its own costs and expenses, the Court articulates such reasons here for the record. *See Hall*, 937 F.2d at 216-17 ("Reasons for the decision should be stated by the trial court when the prevailing party is not awarded costs."); *see also Sheets v. Yamaha Motors Corp., U.S.A.*, 891 F.2D 533, 539 (5th Cir. 1990) ("[T]he district court is required to provide justification for its

actions [in denying costs]."). First, the Court refused to award costs to GELAAC because the case involved close questions of law and because the Court found that Moody Bank brought suit in good faith. *See Malbrough v. State Farm Fire & Cas. Co.*, No. Civ.A. 95-3340, 1996 WL 696290, at *1-2 (E.D. La. Nov. 25, 1996) (refusing to amend a judgment to award costs to the prevailing party "because the matter involved close and difficult issues and the suit was brought in good faith"). Second, the Court finds that certain of GELAAC's actions unnecessarily extended the time necessary for the action to be resolved. For example, the corporate representative GELAAC provided for deposition stated that she had not made any effort to investigate the meaning of the letter that clearly formed the basis of Moody Bank's Complaint. In fact, the corporate representative did not discuss the letter's meaning with the employee who wrote it, Teresa Brissette. Furthermore, GELAAC did not even disclose Brissette as a "person with knowledge" in its Original Rule 26(a) Disclosures, despite the fact that the case obviously would turn on the meaning of her letter, and GELAAC did not provide Moody Bank with Brissette's address until discovery was well underway. The Court finds that this case could have been resolved with greater celerity had GELAAC been more forthcoming during discovery. Thus, because this case presented close questions of law, which Moody Bank presented in good faith, and because certain of GELAAC's tactics during discovery unnecessarily delayed the case's resolution, the Court again determines that each Party should bear its own taxable costs and expenses.

The Court alternatively holds that GELAAC's Motion to Alter or Amend Judgment is untimely and denies the

Motion on that basis as well. GELAAC's Motion is solely a Motion for costs, which, according to Rule 54(d)(1) and Fifth Circuit authority, must be made within five days of the clerk's entering the cost award on the docket. *See* Fed. R. Civ. P. 54(d)(1); *see also Prince v. Poulos*, 876 F.2d 30, 33-34 (5th Cir. 1989) (refusing to award costs on appeal because the appellant failed to object to the costs within the five-day time period required by Rule 54); *Walker v. California*, 200 F.3d 624, 626 (9th Cir. 1999) ("In light of the language of Rule 54(d)(1) and ample persuasive authority from our sister circuits, we hold that a party may demand judicial review of a cost award only if such party has filed a proper motion within the five-day period specified in Rule 54(d)(1)."). The clerk of this Court entered the Order Granting Defendant's Motion for Summary Judgment and Final Judgment in this case on June 30, 2003. Defendant did not file its objection to the Court's cost award until July 14, 2003 – nine days too late. Thus, the Court alternatively holds that Defendant's request for costs must be denied because of its untimeliness.

II. Conclusion

The underlying dispute between the Parties presented a close question, which this Court spent considerable time and effort analyzing. Ultimately, the Court reached the conclusion that Defendant should prevail on the merits, despite Plaintiff's sincere arguments to the contrary and despite Defendant's dilatory discovery tactics. In this case, prevailing on the merits should have been sufficient for Defendant – the Court does not appreciate Defendant's demand for a pound of flesh as well. For all of the reasons set forth above, the Court hereby **DENIES** Defendant's

Motion to Alter or Amend Judgment. Each Party is to bear its own taxable costs and expenses incurred herein to date.

IT IS SO ORDERED.

DONE this 29th day of July 2003, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

FRAP 4. APPEAL AS OF RIGHT – WHEN TAKEN

(a) Appeal in a Civil Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of

the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal – in compliance with Rule 3(c) – within the time prescribed by this Rule measured from

the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days

after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by

Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the

last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order – but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) – becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective – without amendment – to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time.* Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.